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No. 00-730

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

RODNEY E. SLATER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve the compelling governmental interest of remedying the effects of racial discrimination that impede the ability of socially and economically disadvantaged individuals to participate in opportunities created by government contracting.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-98) is reported at 228 F.3d 1147. The opinion of the district court (Pet. App. 128-201) is reported at 965 F. Supp. 1556.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a set of federal statutes and regulations that constitute the Disadvantaged Business Enterprise (DBE) program of the U.S. Department of Transportation (DOT). That program provides opportunities for socially and economically disadvantaged business enterprises to participate in federally-aided highway and transit programs. The DOT's current DBE program differs substantially from the program that was in effect when this Court first reviewed this case in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S.

200 (1995). Many of the changes to the program were made in response to the Court's *Adarand* decision. See 64 Fed. Reg. 5096, 5101-5103, 5129 (1999); 49 C.F.R. Pt. 26.

1. This case arose out of the now-discontinued Subcontractor Compensation Clauses or SCCs formerly used by the Federal Highway Administration (FHWA), an agency of the DOT, in contracts for highway construction on federal lands. As originally conceived and employed, SCCs provided financial incentives for prime contractors to subcontract with DBEs. See *Adarand*, 515 U.S. at 209. They thus enabled the DOT to satisfy certain objectives under the Small Business Act (SBA), 15 U.S.C. 631 *et seq.*, and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132. See *Adarand*, 515 U.S. at 209. The SCCs were designed to help achieve a federal government-wide goal, established by the SBA, that small disadvantaged businesses participate in at least "5 percent of the total value of all prime contract and subcontract awards." 15 U.S.C. 644(g)(1) (1994 & Supp. IV 1998). And they were to help the DOT meet the goal, set by the STURAA, for DBE participation in highway construction on federal lands. Under Section 106(c)(1) of the STURAA, "not less than 10 percent" of the funds authorized by the STURAA are to "be expended with small business concerns owned and controlled by" socially and economically disadvantaged individuals, unless the Secretary of Transportation in his or her discretion determines otherwise. 101 Stat. 145. The five and ten percent participation levels are aspirational goals; they are not mandatory participation requirements.

Under Section 8 of the SBA, an individual is "[s]ocially disadvantaged" if he or she has been "subjected to racial or ethnic prejudice or cultural bias because of" his or her "identity as a member of a group without regard to * * * individual qualities." 15 U.S.C. 637(a)(5). An individual is considered "[e]conomically disadvantaged" if his or her "ability to compete in the free enterprise system has been

impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). See also 49 C.F.R. Pt. 26, App. E (definitions of social and economic disadvantage). Section 8 of the SBA provides a presumption used in making initial social and economic disadvantage determinations. In particular, Section 8 provides that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities," as well as other groups designated from time to time by the Small Business Administration, are presumed to be socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C)(ii). Section 106(c)(2)(B) of the STURAA adopted that presumption for the DOT's DBE program and extends it, in the context of highway and transit contracting, to include women as well. See 101 Stat. 146. After that provision of the STURAA expired in 1991, Congress re-enacted it as Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1919-1921. In 1998, Congress re-enacted the provision as Section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 113-115. See pp. 5-6, *infra*.

Notwithstanding the presumption, the DOT currently requires *all* individuals claiming to be disadvantaged to certify, in a notarized document, that they in fact are socially and economically disadvantaged within the meaning of the statute and agency regulations. 49 C.F.R. 26.67(a)(1); 64 Fed. Reg. 5136. In addition, such individuals must provide financial data to ensure that their net worth does not exceed regulatory limits. 49 C.F.R. 26.67(a)(2), (b); 64 Fed. Reg. 5098, 5117, 5136-5137. Finally, both the presumption and certification may be rebutted, 49 C.F.R. 26.67(b); 64 Fed. Reg. 5136, and third parties may challenge an applicant's eligibility by showing that the applicant is not actually

socially or economically disadvantaged, 49 C.F.R. 26.87; 64 Fed. Reg. 5142.

2. On August 10, 1990, petitioner filed a complaint alleging that the SCC program then in effect violated 42 U.S.C. 2000d *et seq.* (Title VI), and the Fifth and Fourteenth Amendments. Among other things, petitioner contended that it was denied a subcontract on a federal highway project funded by the STURAA because of the SCC program. *Adarand*, 515 U.S. at 205. Petitioner sought only prospective relief.

The district court initially upheld the program under intermediate scrutiny, *Adarand Constructors, Inc.* v. *Skinner*, 790 F. Supp. 240, 244-245 (D. Colo. 1992), and the court of appeals affirmed, *Adarand Constructors, Inc.* v. *Peña*, 16 F.3d 1537, 1539 (10th Cir. 1994). This Court, however, granted certiorari and vacated the court of appeals' judgment. 515 U.S. at 200, 237. In so doing, the Court rejected the contention that race-based classifications imposed by a federal government agency may be upheld against an equal protection challenge under intermediate scrutiny. Instead, the Court held, such classifications are always subject to strict scrutiny. *Id.* at 227. The Court did not address the constitutionality of the SCC program itself. Instead, it remanded the case to the lower courts to determine "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." *Id.* at 238.

Following the remand, petitioner filed a First Amended Complaint, seeking, *inter alia*, a declaration that "§ 105(f) of [the Surface Transportation Assistance Act of 1982], § 106(c) of the STURAA, § 1101(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado." Pet. App. 141. The district court granted petitioner's motion for summary judgment. *Id.* at

200-201. Although the court found that the government had established a compelling governmental interest for the SCC program, the court held that the SCC program did not satisfy strict scrutiny because it was not narrowly tailored to accomplish the asserted interest. *Id.* at 180, 200.

While the case was pending on appeal before the Tenth Circuit, Congress in 1998 reconsidered the DBE program and re-authorized it in the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1), 112 Stat. 113. Before passing TEA-21, Congress extensively debated whether to renew the DBE program. During those debates, Congress considered, and soundly rejected by bipartisan votes, two amendments that would have eliminated the DBE program. 144 Cong. Rec. S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). Congress found that goal-based programs like those in the DBE program were the only effective means to combat the continuing effects of discrimination. Studies of DBE participation in several States showed that, where the States terminated their DBE programs, DBE participation in the state-funded portion of the highway program fell to nearly zero. See 144 Cong. Rec. S1404, S1409-1410, S1420 (Mar. 5, 1998); *id.* at S1482 (Mar. 6, 1998). Congress, moreover, found evidence showing that discrimination continued adversely to affect the ability of certain groups to participate in highway construction. For example, there was evidence of overt discrimination in the awarding of subcontracts; pay disparities that cannot be explained by other factors; discrimination in the provision of business loans and bonding; and the adverse consequences of an "old-boy" network that effectively excluded minorities and women. 144 Cong. Rec. S1409, S1413, S1422, S1429-S1430. See 64 Fed. Reg. at 5100-5102 (summarizing).

Congress also considered and debated at length the DBE program as it had been implemented by the DOT under the earlier Acts. During those debates, Congress was made

aware of the fact that the DOT was revising its regulatory program to address outstanding judicial, legislative, and practical concerns, and to more narrowly focus the program's application to small firms owned by individuals who are truly socially and economically disadvantaged. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998). See, *e.g.*, H.R. Rep. No. 550, 105th Cong., 2d Sess. 409-410 (1998) ("The Department of Transportation is reviewing the DBE program in light of recent court rulings and has proposed new regulations to ensure that the program withstands constitutional muster.").

Consistent with Congress's expectation, the DOT developed enhanced regulatory safeguards to ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged—*i.e.*, who have been excluded or handicapped in their participation in the industry by discrimination—participate in the DBE program. For example, the DOT now requires that owners of firms applying for DBE certification, including those who are by statute presumed to be disadvantaged, submit a signed and notarized statement that they are socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1). The statement must also disclose the owner's personal net worth, with appropriate documentation. 49 C.F.R. 26.67(a)(2)(i). If the individual's personal net worth, as defined by regulation, exceeds $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual is not eligible for the DBE program. 49 C.F.R. 26.67(b)(1). The regulations further provide that any person may challenge whether a specific DBE owner is in fact socially and economically disadvantaged. 49 C.F.R. 26.87. If a recipient of DOT financial assistance has a reasonable basis to believe that an individual owner who is a member of one of the designated groups is not socially and/or economically disadvantaged, it may at any time commence a proceeding to determine

whether the presumption should be regarded as rebutted with respect to that individual. 49 C.F.R. 26.67(b)(2). Individuals who are in fact socially and economically disadvantaged, but who are not subject to the presumption, also may participate in the program. 49 C.F.R. 26.67(d).

Regarding DOT-assisted contracts issued through state and local programs, the DOT's new regulations include several provisions that specifically address narrow tailoring. See 64 Fed. Reg. 5102-5103. For example, recipients of DOT financial assistance may apply to the DOT for waivers that will release them from almost any DOT regulation if they believe that they can achieve equal opportunity for DBEs under local circumstances through other approaches. 49 C.F.R. 26.15. Recipients can also be exempted from any provision of the regulations if special circumstances make compliance impractical. 49 C.F.R. 26.15(a).

The DOT's new regulations also ask recipients to set their own overall annual goals for DBE participation based on local market conditions, 49 C.F.R. 26.45, and expressly state that the statutory ten percent DBE goal is merely a national aspirational goal. Grant recipients thus are not required to set overall annual or contract goals at the ten percent level or to take any special administrative steps if their goals are above or below ten percent. 49 C.F.R. 26.41(c). The particular goal that each recipient selects, moreover, is not imposed by the government; nor may the recipient tie its goal to the ten percent national figure Congress urged the DOT to achieve. Instead, each recipient must select its own method for goal setting based on a two-step process that reflects the recipient's market conditions. 49 C.F.R. 26.45. No penalty is imposed upon a recipient for simply failing to meet its overall goals. 49 C.F.R. 26.47.

The regulations specifically prohibit the use of quotas or set-asides. 49 C.F.R. 26.43; 64 Fed. Reg. at 5107-5108. Indeed, the DOT requires recipients to meet the maximum feasible portion of their goals through race- and gender-

neutral means. 49 C.F.R. 26.51(a). Such means include arranging solicitations in ways that facilitate participation by all small businesses, including DBEs; providing assistance in overcoming limitations such as the inability to obtain bonding or financing; providing technical assistance and services to small businesses; and engaging in outreach efforts. 49 C.F.R. 26.51(b). Contracting agencies are instructed to use potentially race- and gender-conscious measures, such as contract goals, *only* if they cannot meet their overall goals through race- and gender-neutral means. 49 C.F.R. 26.51(d). Even when an in-place contract goal is not met, a prime contractor that demonstrates that it has made good-faith efforts to achieve the goal must be awarded the contract. 49 C.F.R. 26.53. The DOT's new regulations require recipients to reduce their use of DBE-conscious measures during the year if it is determined that they can achieve a greater proportion of their overall goal through race- and gender-neutral measures than previously had been projected. 49 C.F.R. 26.51(f)(1).

3. In January of 1999, the court of appeals held that this case had become moot because Colorado had certified petitioner as a DBE, Pet. App. 117, but this Court reversed, *Adarand Constructors* v. *Peña*, 528 U.S. 216 (2000) (per curiam); Pet. App. 111-112. Following the remand, the DOT in March of 2000 further amended its small business contracting program. This time the DOT eliminated the use of SCCs, the financial incentives the Court had considered in its first *Adarand* decision and that had been the subject of petitioner's complaint. See Pet. App. 97 ("Adarand does not dispute" that "the SCC, which spawned this litigation in 1989, is no longer in use."); Pet. 4.[1]

[1] Indeed, we are advised that there are, at most, one or two outstanding potential (*i.e.*, not yet submitted) claims for payment under contracts with the Central Federal Lands Highway Division, entered into before March of 2000, that contained SCCs. Any such claims for payment, however, would relate to work that has already been completed on contracts that were entered into long ago. Accordingly, such payments (if any) would cause petitioner no injury, and could not form the basis of a claim for prospective relief.

Following the submission of supplemental briefs addressing the new statute and the DOT's new regulations, on September 25, 2000, the court of appeals held that the DOT's current DBE program satisfies constitutional standards. Pet. App. 1-98. Following this Court's guidance in its first *Adarand* decision, 515 U.S. at 227, 238, the court of appeals examined Section 1101(b) of TEA-21 and the new DOT implementing regulations under strict scrutiny, Pet. App. 8, 24, asking whether the program is narrowly tailored to serve a compelling government interest, *id.* at 24, 54-57.

With respect to the government's interest, the court of appeals agreed with the district court that the government had a compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies," Pet. App. 54, and in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," *id.* at 25. The court of appeals reviewed at length the evidence that had been presented to Congress since the early 1970s and found that Congress had "a strong basis in evidence" to support its conclusion "that racial discrimination and its continuing effects have distorted the market for public contracts." *Id.* at 24-49. That evidence had been produced through numerous congressional investigations and hearings, and included outside statistical and anecdotal sources, including the voluminous evidence published in the Federal Register as *The Compelling Interest*, 61 Fed. Reg. 26,050-26,063 (1996). See Pet. App. 36-38. The evidence showed not only that prime contractors refused "to employ minority subcontractors due to 'old boy' networks" and that subcontractors' unions had excluded minorities, but also that minorities were subject to intentional discrimina-

tion in bid selection and in the provision of capital and services needed to compete for and participate on construction projects. Pet. App. 33-39. That evidence, according to the court, supported Congress's finding that racial discrimination has impeded the formation of minority businesses. *Id.* at 33-34. The court of appeals also found that barriers to competition by minority enterprises persisted. *Id.* at 39-44. Among other things, the court of appeals noted congressional investigations that showed racial discrimination by financial institutions and bonding companies; local disparity studies; and evidence that minority participation in state construction markets dropped sharply or disappeared entirely once a State eliminated its DBE program. *Ibid.* Accordingly, the court found that the government had "more than satisfie[d]" its burden of providing a strong basis in evidence supporting the "compelling interest for a race-conscious remedy." *Id.* at 54.

With respect to the requirement of "narrow tailoring," the court of appeals found that certain provisions of the *prior* DBE certification process—*e.g.*, the presumption that members of certain minority groups and women were economically disadvantaged without inquiry into individual circumstances—were not narrowly tailored. Pet. App. 72-74. It also held that the automatic use of financial incentives to encourage the award of subcontracts to DBEs, as originally contemplated by the SCC program, failed to pass constitutional muster. *Id.* at 79. But the court concluded that the new DOT regulations and amendments had cured the constitutional deficiencies in the earlier DBE program. *Ibid.* At the outset, the court of appeals noted that petitioner did not challenge the district court's finding that Congress had unsuccessfully tried to cure the effects of discrimination in the contracting market through race-neutral means. *Id.* at 57-58. Then, citing the requirement that recipients use race-neutral means to meet their overall goals before resorting to race-conscious methods, 49 C.F.R. 26.51(a), and the available

race-neutral measures enumerated in 49 C.F.R. 26.51(b), the court found that the new regulations were narrowly tailored. Pet. App. 59-60.

The court of appeals also determined that the program was narrowly tailored through durational limits. First, the court noted (Pet. App. 62), the presumption of social and economic disadvantage contained in Section 8(d) of the SBA would cease to apply with respect to any individual contractor certified by the Small Business Administration three years after the contractor's initial certification. "If a business wishes to remain certified for longer than three years, it must 'submit a new application and receive a new certification.'" Pet. App. 62. Second, the DOT DBE program itself has a limited duration. It expires at the end of six years, together with TEA-21. *Id.* at 62-63. And Congress's extensive debate regarding whether to renew the DBE program before passing TEA-21, the court further held, underscored the fact that Congress had specifically and recently found that there was still a remedial need for the DBE program. *Ibid.*

The court of appeals also evaluated the DBE program in accordance with four other narrow tailoring considerations discussed in *United States* v. *Paradise*, 480 U.S. 149, 171 (1987): the program's flexibility, the degree to which aspirational goals "correspond to an actual finding as to the number of existing minority-owned businesses," the burden on third parties, and whether the DBE program is over- or under-inclusive. Pet. App. 63-79. As to the first factor, the court found that the flexibility requirement was satisfied because of 49 C.F.R. 26.15's express waiver provision, which allows recipients to seek waivers and exemptions from DBE requirements "despite the already non-mandatory nature of DBE programs." Pet. App. 63-64. Turning to the second factor, the court of appeals emphasized that the five and ten percent national goals were merely aspirational, unlike the mandatory percentage requirement at issue in *City of*

Richmond v. *J.A. Croson Co.*, 488 U.S. 469, 508 (1989). Pet. App. 66. Moreover, the court noted that recipients set their own overall goals according to local market conditions, taking into account "the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts." *Id.* at 67-68. And it observed that there is no penalty if a recipient acts in good faith but fails to meet its goal. *Id.* at 68-69. Those features, the court of appeals stated, ensure that the recipient's goals for DBE participation will realistically (but not inflexibly) reflect the number of available and capable DBEs in the particular market.

The court of appeals further concluded that neither the SCC nor DBE programs imposed a burden on third parties that was of a magnitude that might render the programs constitutionally infirm. Pet. App. 69-71. As for the DBE program, the court found that changes in the SBA and the new DBE regulations under TEA-21 sufficiently cabined the burden on non-minority businesses by making the program narrowly tailored. For instance, the regulations (see 49 C.F.R. 26.61(d); 13 C.F.R. 124.105(c)(1)) now require non-minority applicants for DBE certification to prove social disadvantage by a preponderance of the evidence, rather than by clear and convincing evidence. Pet. App. 70. The new regulations, furthermore, "require recipients to ensure that DBEs are not 'so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate.'" Pet. App. 70 (citing 49 C.F.R. 26.33(a)).

Lastly, the court of appeals rejected petitioner's argument that Congress must inquire into discrimination against each particular minority group or women in a State's construction industry in order to ensure that the DBE program is not over- or under-inclusive. Pet. App. 71-79. Citing the new regulations' requirement that DBE applicants submit notarized statements of their owners' social and economic disadvantage along with documentation in support of the

economic disadvantage claim, 49 C.F.R. 26.67(a), the court found that such an individualized showing was enough to satisfy narrow tailoring. Pet. App. 74-75. The court further held that to mandate an individualized inquiry into the DBEs in discrete markets like the Colorado construction industry would be "at odds with [Tenth Circuit] holdings regarding compelling interest and Congress's power to enact nationwide legislation." *Id.* at 75-77 & n.25. Indeed, the court of appeals observed, to require the "degree of precise fit" that petitioner proposed "would again render strict scrutiny 'fatal in fact.'" *Id.* at 77. Such automatic "fatality is inconsistent with [*Adarand*] * * * in its declaration that strict scrutiny was not fatal in fact." *Ibid.*

ARGUMENT

The court of appeals in this case correctly and carefully applied the test of strict scrutiny to evaluate the constitutionality of the Department of Transportation's (DOT) Disadvantaged Business Enterprises (DBE) program. Its decision does not conflict with any decision of this Court or any other court of appeals. The decision, in fact, is the first court of appeals decision to address the validity of that program following this Court's decision in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and the substantial revisions that the DOT made to the program in response to *Adarand*. This case, moreover, focused primarily on a specific aspect of the DOT's small business program—the use of Subcontractor Compensation Clauses or SCCs—that had been discontinued before the court of appeals issued its decision, and petitioner sought only prospective relief. Consequently, the case has become somewhat divorced from the concrete context of an actual application that traditionally assists this Court in deciding cases. Moreover, other federal courts are now reviewing the current DOT DBE program. Those cases will permit a number of circuits to address the constitutionality of the program in a context with a more meaningful

forward-looking effect, and consequently provide this Court with the opportunity to conduct further review as appropriate. Accordingly, review of the issue raised by petitioner is not, at this time, warranted.

1. Although "[s]trict scrutiny remains * * * strict," *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion), this Court has rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand*, 515 U.S. at 237. Petitioner does not dispute that the decision below, by its terms, applies strict constitutional scrutiny to the DOT's DBE program. Instead, petitioner argues that the court of appeals' application of strict scrutiny may have been somewhat more "lenient" than it should have been. Pet. 5. Petitioner, however, identifies nothing in the court of appeals' opinion that states, much less holds, that there are two standards of strict scrutiny, or that a lesser standard of strict scrutiny should be or was applied here. Instead, petitioner points to a series of alleged (and mostly case-specific) errors that, in petitioner's view, amount to a *misapplication* of the strict scrutiny test. See Pet. 16 ("Although the panel correctly recited that test, * * * the panel badly misapplied each of the elements."). For example, petitioner argues that the court of appeals overlooked race-neutral remedies, Pet. 10-13; misanalyzed the durational limits on the DBE program, Pet. 13-14; and accepted as "strong evidence" proof that, in petitioner's view, was not strong at all, Pet. 15-25. The allegation that a court of appeals has misapplied settled law to the particular facts of a case is not the sort of matter that ordinarily warrants this Court's review.

Indeed, for that reason, the question on which petitioner seeks review is not well presented by this case. If the court of appeals had concluded that Congress's findings are entitled to greater deference (within the confines of strict scrutiny) than similar findings by a state or local government, there would be some justification for that conclusion. The judiciary is bound to give the decisions of Congress—the co-

equal branch of government to which Section 5 of the Fourteenth Amendment textually accords specific remedial authority—"great weight." See *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980) (plurality opinion); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when * * * Congress specifically considered the question of the Act's constitutionality."). As Justice O'Connor's opinion in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), explains, "other governmental entities might have to show more than Congress before undertaking race-conscious measures: 'The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.'" 488 U.S. at 489 (quoting *Fullilove*, 448 U.S. at 515-516 n.14 (Powell, J., concurring)). See also *id.* at 521-523 (Scalia, J., concurring). Although *Adarand* makes it clear that the use of any race-conscious measure (whether by the federal government or a State) is subject to strict scrutiny, the opinion reserves judgment on "the extent to which courts should defer to Congress' exercise of [its] authority" within the confines of strict scrutiny. 515 U.S. at 230-231. See also *id.* at 268-269 (Souter, J., dissenting). Because the decision below declines to resolve that issue, Pet. App. 25-26, instead finding that the DBE program as currently constituted survives an undifferentiated standard of strict scrutiny, this case does not present the Court with reason to resolve the issue either.

In any event, following this Court's decision in *Adarand*, Congress comprehensively re-examined and then reauthorized the DBE program in the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1), 112 Stat. 113, and did so on the understanding that the DOT was in the process of revising its implementation to address outstanding judicial, legislative, and practical concerns, and to more narrowly focus the program's

application to small firms owned by individuals who are truly socially and economically disadvantaged. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998); H.R. Rep. No. 550, 105th Cong., 2d Sess. 410 (1998) (TEA-21 Conference Report). As a result of those recent revisions, the current DBE program and regulations significantly differ from those in place when this Court decided *Adarand*, and the decision below represents the first and to date only appellate decision addressing their constitutionality in light of *Adarand*. Given the significant nature of the revisions the DOT made to its regulations following *Adarand*, we believe it would be appropriate to permit other courts to address the constitutionality of the program, as currently constituted, in light of *Adarand* before this Court undertakes such review for itself.

That course would be particularly appropriate here because this lawsuit, although not moot, in large part seeks prospective relief with respect to a device, the SCC, that is no longer used. In contrast, there are a number of pending lawsuits against the DOT concerning the federal DBE program, and against state and local public authorities, challenging other features of the current program.[2] Other lower courts are also considering the constitutionality of race-based classifications in other federal government contracting

[2] See *Klaver Constr. Co.* v. *Kansas Dep't of Trans.*, No. 99- 2510-KHV (D. Kan.); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, No. 00-CV-1026 (D. Minn.); *Gross Seed Co.* v. *Nebraska Dep't of Roads*, No. 00-3073 (D. Neb.); *Western States Paving Co.* v. *Washington Dep't of Transp.*, No. 00-5204 (W.D. Wash.); *Northern Contracting, Inc.* v. *Illinois*, No. 00-4515 (N.D. Ill.); *Falconite, Inc.* v. *Oklahoma*, No. 00-CV-1494 (W.D. Okla.); *Houston Contractors Ass'n* v. *Metropolitan Transit Auth.*, No. H-98-3651 (S.D. Tex.); *Kossman Contracting Co.* v. *Metropolitan Transit Auth.*, No. H-96-3036 (S.D. Tex.).

programs.[3] Those pending cases will permit a number of circuits, in the near future, to address the issue in a more meaningful and concrete context. Once that has occurred, this Court can determine whether further review of the issue is appropriate and, if it conducts that review, it will have the benefit of the considered judgment of multiple lower federal courts. As Justice Stevens stated respecting the denial of petitions for a writ of certiorari in *McCray* v. *New York*, 461 U.S. 961, 963 (1983), "it is a sound exercise of discretion for the Court to allow [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."

Another factor counseling against review at this time is the fact that the program is subject to review by the Comptroller General this year. TEA-21 itself provides that "the Comptroller General of the United States shall conduct [in 2001] a review of, and publish and report to Congress findings and conclusions on, the impact throughout the United States of administering the" DBE provisions. TEA-21 § 1101(b)(6), 112 Stat. 114. The Court ought not undertake the important task of constitutional review of the program before that legislatively mandated review takes place.

2. Petitioner's remaining contentions are unsupported by the law or the record, and in any event are largely case-specific. As a result, none warrants this Court's review.

a. Petitioner spends much of its brief attacking the finding that the government has a compelling interest to support the DOT's DBE program. The court of appeals, petitioner asserts, erred in finding that interest supported by "society-wide disparities" rather than "particularized findings of racial discrimination" suffered by individual qualified minority companies, Pet. 16, 19-21, and by finding that the DBE pro-

[3] See, *e.g.*, *C.S. McCrosson* v. *Cook*, No. 95-1345 (D.N.M.), appeal pending, No. 00-2515 (10th Cir.); *DynaLantic* v. *Department of Defense*, No. 95-CV-2301 (D.D.C.).

gram was narrowly tailored even though there allegedly was no showing that Congress inquired into whether each person seeking to take advantage of a race-based preference had suffered from the effects of discrimination at the hands of the government, Pet. 7-10. The court of appeals' failure to require such particularized findings, petitioner contends, is inconsistent with the requirements of strict scrutiny set forth by this Court's decision in *Croson*, *supra*, and its first *Adarand* decision. Pet. 7-15.

As an initial matter, those claims appear to rest on the erroneous factual assumption that individual applicants may obtain the DBE designation without any individualized showing that they have suffered discrimination. The DOT's new regulations refute that assumption. Under those regulations, the owners of firms seeking DBE designation must certify that they are in fact socially and economically disadvantaged. 49 C.F.R. 26.67(a). Owners thus, in effect, must certify in a notarized document that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities" so as to establish social disadvantage, 15 U.S.C. 637(a)(5), *and* that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," so as to establish economic disadvantage, 15 U.S.C. 637(a)(6)(A). The DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants for DBE certification, moreover, must submit documentation of their owner's personal wealth; if the owner's net worth exceeds $750,000, any presumption of disadvantage is considered irrefutably rebutted. See 49 C.F.R. 26.67(a)(2). Even a facially valid certification, moreover, is

rebuttable, 49 C.F.R. 26.26(b); and third parties may challenge eligibility by showing that the owner is not actually socially or economically disadvantaged, 49 C.F.R. 26.87.

As a result, the DOT's current DBE program *does* look to whether those seeking to participate have individually suffered the effects of the discrimination that the program seeks to redress. And the DOT's preliminary experience with the requirement suggests that it has a significant effect; imposition of the certification requirement, it appears, substantially alters both the number and identity of DBE applicants. The certification requirement for social and economic disadvantage, moreover, guards against over-inclusiveness, ferreting out those who are not truly disadvantaged. And it renders petitioner's claim that it has been harmed by the use of racial categories or presumptions largely illusory. As the district court explained in *Interstate Traffic Control* v. *Beverage*, 101 F. Supp. 2d 445, 453 (S.D. W. Va. 2000), the only way another party may now be injured by the rebuttable race- or gender-related presumption set forth in the statute is if an applicant commits fraud by falsely certifying and the fraud goes unchallenged. Petitioner nowhere alleges that such fraud exists, much less that it is sufficiently common as to have a likely effect on petitioner in the future.[4]

Petitioner also argues that Congress cannot exercise its national jurisdiction to establish a national program; instead, petitioner seems to argue, Congress can have a compelling interest only if it makes localized, market-by-market

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[4] Perhaps recognizing that the new regulations are largely fatal to its position, petitioner argues that the new regulations are not applicable to the current challenge, and are in any event inconsistent with the statute and therefore invalid. See Pet. 26-29. As explained below (pp. 26-29, *infra*), it is far from clear that those arguments are properly before the Court, and they are without merit. In any event, Congress has the authority to make group specific determinations of discrimination, and we disagree with petitioner's submission that Congress may act to correct the effects of discrimination only after making specific findings for each victim participating in a remedial program. See pp. 14-15, *supra*.

findings of discrimination and disadvantage for each covered local jurisdiction throughout the country. The court of appeals properly rejected that contention. Pet. App. 27. In *Croson*, this Court rejected the City of Richmond's attempt to justify a "rigid [30%] racial quota" in the awarding of City contracts, where the City presented no evidence of discrimination in the Richmond construction industry. 488 U.S. at 499-500, 504. *Croson*, however, does not speak to the geographic scope of Congress's powers; it speaks to the fact that local authorities must justify their use of race-conscious remedies based on local conditions. Moreover, *Croson* specifically contrasts the powers of Congress with those of the States. *Id.* at 504; *id.* at 490 (opinion of O'Connor, J.) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that * * * the States and their political subdivisions are free to decide that such remedies are appropriate.").[5] In any event, even though the DBE program is national in nature, the portion of it that is subject to strict scrutiny—the use of race-conscious means—is not of uniform nationwide application. To the contrary, that portion of the program is distinctly and heavily tailored to local conditions. Pet. App. 27 n.10 (noting that issue is best addressed under narrow tailoring). The new DOT regulations provide a system of waivers and exceptions based on local concerns, and bar the use of any race-conscious remedy where the effects of discrimination and program goals can be achieved through neutral means. See pp. 11-12, *supra*; p. 25, *infra*.

Finally, petitioner seems to contend that the federal government has no interest in eliminating the effects of discrimi-

[5] Nothing in the Court's subsequent decision in *Adarand*, 515 U.S. at 200, eliminates that fundamental distinction between the remedial authority of Congress and that of state and local governments. That decision merely clarified the standard of review that courts should apply to federal racial classifications; it did not limit the geographic scope of Congress's authority.

nation unless the federal government *itself* has engaged in illegal discrimination. See Pet. 21. That assertion is incorrect as a matter of law. Pet. App. 26. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.).[6] Congress acted within its authority in creating the DBE program to achieve that end here.

b. Petitioner also argues that in this case the government did not produce sufficiently convincing proof of discrimination in the highway construction industry. In particular, petitioner asserts (Pet. 11-14) that the court of appeals erroneously treated common barriers, faced by all new entrants to the industry, as barriers to minority participation that might justify a race-conscious remedy. That argument, however, mischaracterizes the evidence on which the court of appeals and Congress relied. The evidence showed that certain groups suffered discrimination—both overt and covert—in access to capital and needed services, such as the provision of performance and payment bonds, not because they were new entrants but because of race and gender. For example, the court found that the "government's evidence is particularly striking in the area of race-based denial of access to capital." Pet. App. 35. The court noted studies showing disparate treatment of black-owned businesses even when "all other factors are equal"—including one study showing that certain minorities were 1.5 times to 3 times as likely to be turned down for "loans as whites"—and concluded that the "findings strongly support an initial showing of discrimination in lending." Pet. App. 37-38. Petitioner also

[6] A substantial portion of federal transportation dollars is distributed to subcontractors, which are not selected by the government on the basis of lowest bids, but are chosen instead at the discretion of private prime contractors. See p. 22, *infra*.

ignores the evidence, specifically cited by the court of appeals, that prime contractors "often resist working with" minority enterprises by "shopping" low bids from minority-owned firms to avoid contracting with them, *id.* at 41, and others showing that minority-owned firms are two to three times as likely to be denied performance and payment bonds (a necessity in government contracting) as white-owned firms "with the same experience level," *id.* at 42-43. See also *id.* at 44 (evidence of discriminatory pricing by suppliers). Moreover, to the extent petitioner believes that a particular DBE applicant has not suffered disability beyond that suffered by any other new entrant into the industry, petitioner is free to challenge the applicant's DBE status; petitioner, however, has chosen not to do so.[7] Finally, petitioner's argument is belied by numerous studies, considered by Congress before it passed TEA-21, showing that minority participation in various States became virtually nonexistent once the state DBE program was eliminated, and demonstrating that minorities face barriers not shared by all new businesses. Pet. App. 49; see also 144 Cong. Rec. S1401, S1409-1410, S1420 (Mar. 5, 1998); *id.* at S1482 (Mar. 6, 1998). Congress thus did not, as petitioner contends (Pet. 11-12), reject race-neutral alternatives in favor of the DBE program without considering such alternatives. Instead, it found that those alternatives had proved ineffectual.[8]

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[7] Petitioner's claim that the court of appeals improperly shifted the burden of proof (Pet. 24-25) is without merit. The court of appeals expressly put the government to its "burden of presenting a 'strong basis in evidence' sufficient to support its articulated * * * compelling interest." Pet. App. 49. It simply found that the government had done so, and noted that petitioner had "utterly failed" to introduce evidence of its own to rebut the government's proof. *Id.* at 50-54.

[8] Perhaps recognizing its failure to rebut the evidence relied on by Congress and the court of appeals, petitioner also argues that such evidence is irrelevant because it was not before Congress in 1978 when the presumption of disadvantage in the SBA was first enacted. See Pet. 21-22. But when Congress reconsidered and then re-authorized the DOT's DBE program in 1998—specifically rejecting amendments that would have eliminated the program—Congress did have that extensive evidence before it. See pp. 5-6, 15-16, *supra*. See also TEA-21 Conference Report, *supra*, at 409 ("Subsection 102(b) continues the Disadvantaged Business Enterprise provisions."). Consequently, for present purposes, the relevant record is the one Congress addressed when it reconsidered the program in 1998 in light of this Court's *Adarand* decision; not the record that existed pre-*Adarand* in 1978. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (courts must review significant changes to the law or facts when considering injunctive relief).

Alternatively, petitioner attempts to attribute ill intentions to Congress, declaring (Pet. 23-24) that "it is clear from the legislative history of the most recent highway funding statute to incorporate the racial classifications" that Congress was not providing a remedy for individualized harm, but rather was trying to achieve "racial proportionality in the highway construction industry." See also Pet. 19-21. But the legislative history shows precisely the opposite to be true. Congress sought to remedy the effects of discrimination; it was aware of and relied on the proposed DOT regulations when it considered passing TEA-21; and it wanted to ensure that the DBE program was constitutional, and not over-inclusive, before renewing the DBE program. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998). See also TEA-21 Conference Report, *supra*, at 409-410. The new regulations, for example, contain such safeguards as requiring recipients of DOT financial aid to devise overall goals for DBE participation that reflect local conditions. 49 C.F.R. 26.45(c). And those seeking DBE designation, moreover, must certify that their owners are socially and economically disadvantaged. 49 C.F.R. 26.67(a).

3. Petitioner also claims that the DOT's DBE program is not narrowly tailored. Pet. 8-14. Petitioner's contentions on narrow tailoring, however, largely mirror its arguments regarding the compelling interest. For example, petitioner argues (Pet. 8) that the program is not narrowly tailored be-

cause no individual proof of economic and social disadvantage is required of DBE program participants. As explained above (pp. 18-19, *supra*), that is incorrect—*all* participants must certify, in a notarized document, that they are in fact socially and economically disadvantaged, *i.e.*, that they have been subject to discrimination and have been deprived of the opportunity to participate in the relevant market as a result; and third parties like petitioner may challenge that certification and put any applicant to its burden of proof. Nor is it true (Pet. 10-11) that the barriers to participation the DBE program seeks to overcome are common to all new entrants. The record demonstrates that women and minorities face a unique barrier in this context—discrimination. See pp. 21-22, *supra*. See also 61 Fed. Reg. 26,050-26,063 (1996). That is the barrier the DBE program seeks to overcome.

Petitioner, moreover, mostly ignores the numerous ways in which the program is finely tailored. See *United States* v. *Paradise*, 480 U.S. 149, 187 (1987) (articulating additional factors relevant to narrow tailoring). Most important, the DOT's certification and qualification rules ensure that benefits flow only to those who are truly disadvantaged. All owners of firms applying for certification as a DBE, including minorities and women presumed to be disadvantaged, must submit a signed, notarized statement certifying not only that they are socially and economically disadvantaged, but also verifying their personal net worth, with appropriate supporting documentation. 49 C.F.R. 26.67. If the individual owner's personal net worth exceeds $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual and firm are not eligible to participate in the DBE program. 49 C.F.R. 26.67. Moreover, when a firm's receipts exceed small business standards, it can no longer participate in the program, regardless of its owner's personal net worth. 49 C.F.R. 26.65. Any DBE certification may be challenged, and the DBE program is open to all: Non-

minorities may apply for DBE certification, 49 C.F.R. 26.65, and need demonstrate social and economic disadvantage only by a preponderance of the evidence (not by clear and convincing proof, as formerly required). See 49 C.F.R. 26.67.

Moreover, under the new regulations, recipients may request a waiver from the DBE program (as Colorado has) if they choose to operate their program differently from the way recommended in DOT regulations, see Preamble to 49 C.F.R. 26.15, or receive exemptions if, because of unique circumstances not considered by the DOT, compliance with specific provisions is impractical, 49 C.F.R. 26.15. Recipients subject to the DOT's regulations, moreover, must meet the maximum feasible portion of their annual DBE goals through race-neutral methods, 49 C.F.R. 26.51(a), and may use race-conscious methods only if necessary, 49 C.F.R. 26.51(d). The DBE goals for each recipient, moreover, are established by the recipient itself, under flexible criteria adjusted for local market conditions. 49 C.F.R. 26.45. Recipients are neither required nor encouraged to emulate the nationwide aspirational ten percent goal or employ special measures if their goals are below that level. 49 C.F.R. 26.41(c). And, in setting their goals, recipients must create a baseline figure for the relative availability of ready, willing and able DBEs in each recipient's local market, 49 C.F.R. 26.45(c), and adjust the base figure to ensure that the overall annual goal truly reflects the level of DBE participation that recipients would expect absent the effects of discrimination, 49 C.F.R. 26.45(d). The procedure thus does not bestow any undue benefits on DBEs, but rather seeks to place them on as nearly level a playing field as reasonably possible.[9]

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[9] Recipients also must ensure that non-DBEs are not unfairly excluded from competing for subcontracts through an over-concentration of DBEs in one particular line of business. 49 C.F.R. 26.33. In addition, basing an annual goal and contract goals on the availability of DBEs ensures that, to the extent it is necessary to employ race-conscious criteria,

Finally, the DBE program, having been authorized under a funding statute, is subject to continuous study and periodic re-authorization, adjustment, and review. See pp. 11, 17, *supra*. The program thus will not, and cannot, operate in perpetuity.[10]

Seeking to avoid the effect of those important requirements, many of which were imposed by the 1999 regulations, petitioner asserts (at 25-29) that the court of appeals should not have relied on them. Petitioner does not dispute that, because it seeks solely prospective relief, only the current law and regulations are relevant to its challenge. See *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam) (where plaintiff seeks prospective relief, Court "must review the judgment * * * in light of [the] law as it now stands"); cf. *Rufo*, 502 U.S. at 384. Instead, petitioner argues (Pet. 26-27) that the new regulations do not apply here because they are directed at state and local contracts, rather than federal procurement contracts like the federal contract containing the Subcontractor Compensation Clause (SCC) that petitioner originally challenged.

Petitioner, however, did not raise that argument below, and the court of appeals did not address it. This Court ordinarily does not pass on arguments that were neither pressed

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those are not employed to reduce participation by non-DBE's below current availability to perform government contracts.

[10] Petitioner argues (Pet. 13-14) that, because the program is predicated on barriers to entry that are common to all new entrants, it will operate indefinitely. That argument, however, rests on the mistaken premise that the program is predicated on barriers to entry, not actual discrimination that has prevented and continues to prevent participation by certain groups. In any event, given the sensitive nature of the program and the ongoing nature of review, it is highly doubtful (and certainly premature to predict) that the program's duration is indefinite. Indeed, petitioner ignores the fact that the DBE program was extensively debated before Congress passed TEA-21, expires in 2004, and, as provided in the statute, will be reviewed by the Comptroller General of the United States in 2001. 112 Stat. 114.

nor passed upon in the court of appeals. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1989); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).[11] And the argument is without merit. If this case could be characterized only as a challenge to the use of SCCs in federal procurement contracts, it would be moot, because SCCs have been abolished. Moreover, even in the context of that now-defunct program, the criteria for DBE certification were found in the DBE *regulations*, as petitioner has conceded before. Pet. App. 159. Additionally, when the DOT was implementing the SCC program, it ordinarily contracted with prime contractors, who in turn subcontracted with DBEs. *Adarand*, 515 U.S. at 205. As a result, the DOT did not (and does not) *itself* certify the DBEs, including the DBE, Gonzales Construction Company, that was awarded a subcontract over petitioner a decade ago. Instead, *state entities* receiving federal funding, such as the Colorado Department of Transportation, certified the DBEs *in accordance with DOT DBE regulations*. *Adarand*, 515 U.S. at 209. As a result, the extensive federal aid program regulations, which define the gamut of requirements relating to DBE certification ranging from obligations of the applicant for DBE certification to duties of the recipient state authority, provide the relevant legal framework for constitutional review.[12] Even if that were fairly debatable,

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[11] In fact, in the district court, petitioner had argued (and the district court accepted) that its lawsuit necessarily implicated the regulations because the regulations define the requirements for DBE certification in the federal aid DBE program. Pet. App. 159. Petitioner similarly relied on the pre-1999 version of the regulations in its last petition for a writ of certiorari, and claimed that Colorado's DBE program was inconsistent with the regulations. Pet. at 18-25 & n.24, *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000) (No. 99-295).

[12] Nor can petitioner avoid the effect of those regulations by arguing that it is bringing a facial challenge to the statutes themselves. If the statutes can be implemented in a constitutional manner through the regu-

however, any doubt concerning which law or regulation (or which version of the law or regulation) should be scrutinized in this case weighs strongly in favor of denying review, so the Court may take up the constitutional issue in a case that more clearly and cleanly presents it.

Petitioner also argues (Pet. 28-29) that the 1999 regulations are void because they eliminate or alter Section 8(d)'s "mandatory" presumption of disadvantage by requiring applicants for DBE certification to aver that they meet the relevant criteria and submit documentation regarding economic disadvantage. It is questionable, as an initial matter, whether petitioner has standing to challenge the validity of those requirements, since they cause petitioner no cognizable injury. The court of appeals, moreover, did not address that argument, and there is no reason for this Court to consider it in the first instance. Besides, the argument is without merit. Under the regulations, the presumption continues to operate, since actual proof of disadvantage would be required in its absence. Moreover, Congress clearly intended the presumption to be rebuttable, see S. Rep. No. 4, 100th Cong., 1st Sess. 28 (1987), and the DOT has always treated it as such. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and TEA-21, in any event, expressly give the Secretary of Transportation regulatory discretion in implementation. For instance, the aspirational goal for DBE participation in TEA-21 is qualified by the phrase "[e]xcept to the extent that the Secretary determines otherwise." Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 113.

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lations, the facial challenge must fail. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (court cannot strike down a statute as facially invalid unless there is "no set of circumstances * * * under which the Act would be valid"). In addition, it is not clear that a challenge to the statute alone would constitute a genuine case or controversy. Petitioner cannot claim injury from the statute alone, since the statute is not self-executing. Any injury petitioner may claim must arise from the application of the statute by the DOT through its regulations.

See also ISTEA, Pub. L. No. 102-240, Tit. I, § 1003(b), 105 Stat. 1919-1920 (same).[13]

Finally, petitioner contends (Pet. 27-28) that the statutory presumption for *social* disadvantage is over-inclusive, and the new regulations alter only the presumption for economic disadvantage. But the regulations require all applicants for DBE certification to provide not only a notarized statement of their net worth, but also a notarized statement that they are both socially and economically disadvantaged. 49 C.F.R. 26.67.[14] That certification requirement for showing both

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[13] Nothing in this Court's decision in *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000), is to the contrary. In that decision, the Court simply concluded that Colorado's DBE certification procedure, which did not provide a presumption of social disadvantage for women and certain minorities, was incompatible with the 1999 DBE regulations, which do allow for such a presumption. *Id.* at 222-223. That decision, therefore, has no bearing on whether the presumption of social and economic disadvantage in Section 8(d) may be implemented by the 1999 regulations. Cf. No. 00-295 Pet. at 29. Colorado has changed its DBE program to include the presumption of social and economic disadvantage in conformity with the DOT's DBE regulations.

[14] In addition, petitioner's argument is rebutted by the fact that Section 8(d)'s presumption of disadvantage is a single presumption that applies when the criteria for both social *and* economic disadvantage are met. See 15 U.S.C. 637(d)(1) (1994 & Supp. IV 1998); 49 C.F.R. 26.67. Because the presumption may be invoked only if the applicant for DBE certification is both socially and economically disadvantaged, the refined criteria for determining economic advantage—the requirement that applicants for DBE certification submit documentation of their personal wealth and the rebuttal of the presumption of disadvantage if the applicant's net worth exceeds $750,000, 49 C.F.R. 26.67(b)(1)—render the entire statutory economic and social disadvantage presumption more narrowly tailored. Thus, if a DBE applicant does not meet the economic disadvantage requirements, that applicant is not entitled to a presumption of disadvantage even if he or she may be deemed socially disadvantaged. Under these circumstances, petitioner's demand for more exacting criteria (Pet. 14-15) for showing social disadvantage would be redundant. The certification requirements imposed in the new regulations establish that application of the presumption of social and economic advantage is, contrary to petitioner's assertion, far from "mandatory" and "conclusive." Cf. Pet. 9-10.

social and economic disadvantage guards against over-inclusiveness. Indeed, as explained above (p. 19, *supra*), the requirement ensures that, absent undetected fraud, only those who are truly economically and socially disadvantaged participate in the program, notwithstanding the statute's presumptions. And no allegation of such fraud has been made here.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] The extensive record of discrimination, and the above-described features of the DOT's DBE program, distinguish that program from those addressed in the cases cited by petitioner (at 7) as conflicting with the decision below. For example, in *Monterey Mechanical Co.* v. *Wilson*, 125 F.3d 702 (9th Cir. 1997), the court of appeals did not resolve "how much proof, or what kind of legislative findings" would be required because "the state made absolutely no attempt to justify" the ethnic and gender categories it employed; nowhere did it show that tax money was, in effect, subsidizing discrimination. 125 F.3d at 713. Moreover, the program there, unlike the one here, was not narrowly tailored through a certification requirement or any other means. 125 F.3d at 714. *Contractors Associations of Eastern Pennsylvania* v. *City of Philadelphia*, 91 F.3d 586, 607 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997), is similarly distinguishable. There, the City Council did not show that the 15 percent set-aside for African-American contractors was designed to "approximate market share for black contractors that would have existed, had the purported discrimination not existed," and the percentage selected was disproportionate to the number of minority "construction firms qualified to perform City-financed contracts." 91 F.3d at 607. The participation goals set by recipients here, in contrast, are flexible, based on the availability of qualified DBE firms, and calculated to offset the effects of discrimination. See p. 25, *supra*. Finally, in *Associated General Contractors* v. *Drabick*, 214 F.3d 730 (6th Cir. 2000), petition for cert. pending, No. 00-976, the State's evidence of discrimination was less compelling, *id.* at 736; there was no consideration of non-racial criteria, *id.* at 738; and there was no effort at narrow tailoring through a certification mechanism or otherwise, *id.* at 737.

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